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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY OF CAPITOL AIRWAYS, INC. TO BRIEF OF CIVIL AERONAUTICS BOARD IN OPPOSITION AND TO BRIEF OF NORTHWEST AIRLINES, INC. IN OPPOSITION

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Dated: April 15, 1960
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Capitol Airways, Inc., respectfully submits this Reply to the Brief of the Civil Aeronautics Board and Brief of Northwest Airlines, Inc. in Opposi-

tion to the above designated petition. This reply is filed pursuant to Rule 24 of the Rules of the Supreme Court.

ARGUMENT

A. The Position of the Respondent Civil Aeronautics Board

1. The absence of findings both as to Petitioner's "fitness" and the "public need" for the service it proposed is not cured by finding substantial evidence to support the award to Petitioner's competitors. In order for comparative findings to satisfy the applicable statutory requirements, the competing proposals must, and they were not in this case, be substantially similar. Although the thrust of Petitioner's proposal was for a low cost coach service at fares about 26% below those proposed by Northwest and Delta, the Respondent made no evaluation of these proposed rate reductions. Instead, the Respondent found "we believe that the factors pointing to the selection of Northwest in the Chicago-Miami market and Delta in the Detroit-Miami market require their selection." (J.A. 1331a)

This situation is closely analogous to the one before this Court in *Schaffer Transportation Company* v. *United States*, 355 U.S. 83 (1957), where this statement was made:

> "... the Commission failed to evaluate the benefits that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates ..."

2. Respondent's reply to Petitioner's second contention completely misses the point in suggesting that

the Congressional appearances may be sanctioned if they are open instead of covert. Without arguing which technique may be more effective, Petitioner contends that both destroy the agency's "judicial character" as prescribed by its own Procedural Regulations. It is the fact of Congressional interference, not its form, that violated the appearance of justice, and denied Respondent the fair hearing to which it was entitled.

B. The Position of Northwest Airlines, Inc.

Your Petitioner, Capitol Airways, Inc., has been served with a "Motion to be Named a Party Respondent and For Leave to File Brief in Opposition and Brief for Northwest Airlines, Inc. in Opposition", dated April 11, 1960. Certain statements contained in the brief submitted with the aforesaid motion require clarification and/or correction as follows:

1. Northwest makes the point (Brief, p. 29) that in a consolidated proceeding before the Civil Aeronautics Board, findings that one applicant is superior to others are sufficient, even though no findings are made with reference to unsuccessful applicants. As pointed out above, this argument presupposes that all applicants proposed substantially the same type of service. This was definitely not the case in the instant proceeding. Your Petitioner Capitol Airways, Inc. proposed to exploit a largely untapped air travel market of tremendous proportion by operating a low-cost air transportation service at fares of about 4¢ per passenger mile. In this connection the court's attention is respectfully invited to the dissenting opinion of Member Minnetti of the Civil Aeronautics Board in Order No. E-12203 in the *TWA Interim Fare Increases*

Case, Docket No. 9288, dated February 25, 1958, where the following statement is made:

> "Even more alarming than the possibility of alienating today's coach customers is the effect of this fare increase on the staggering percentage of adult Americans, approximately 75% who have never flown commercially. . . . The coach fare increase, granted by the majority, will further separate air transportation from many of these potential customers, to whom price is a major determinant in selecting a mode of travel."

In other words, the mere finding by the Respondent CAB that the type of service proposed by Northwest is needed (at fares of about 6¢ per passenger mile) does not constitute an adequate evaluation of your Petitioner's proposed low-cost service. Your Petitioner is legally entitled to findings on this subject by the Respondent CAB.

2. Northwest contends (Brief, p. 33) that the statements made by various members of Congress at oral argument "are not regarded or treated by the Board as evidence". This statement is ludicrous if Northwest means to imply either that the Board is not influenced by the appearance by members of Congress at oral argument, or that Northwest did not intend to influence the Board by soliciting such Congressional appearances—such solicitation was assumed by the Court below for purposes of its ruling. For example, its press release decision, dated May 19, 1958, in the so-called *"Seven States"* case, the Board made this statement:

> "While anticipating a considerable increase in the initial subsidy requirements of the airlines

> involved, the Board said that the spread of local service has the *clear approval of the public expressed through members of Congress* and state and civic leaders who have appeared before the Board in this and other cases." (Emphasis added)

Certainly, it would be difficult to find a clearer expression of the fact that appearances by members of Congress at oral argument in adjudicatory proceedings influence the decisions of the Board.

3. Northwest contends (Brief, p. 33) that the Congressmen appeared as "representatives of the Legislative Branch of the Government" under the provisions of 14 C.F.R. Section 302.14. Such is not the case. On the contrary, every member of Congress listed in Capitol Airways' Petition for a Writ of Certiorari, dated March 14, 1960, appeared as an *advocate* for Northwest Airlines and not a single one appeared pursuant to any Congressional resolutions or otherwise as a "representative of the Legislative Branch of the Government."

4. Northwest alleges (Brief, pp. 33-34) that "Capitol made no claim before the Board that the Congressional appearances were improper." This statement of Northwest is untrue. In its Petition for Rehearing, Reargument and Reconsideration, dated October 22, 1958, Capitol Airways, Inc., made the principal point that it was "denied a fair hearing" by virtue of the appearance by members of Congress at oral argument as advocates for Northwest. In its Petition for Rehearing, Capitol Airways quoted the same statements of the various Congressmen as were quoted in its petition to this honorable court. Moreover, in the court below, your Petitioner made the additional point

that the CAB had violated its own rules of practice in that it had permitted telegrams and other written statements to be transmitted by members of Congress or their representatives to the Board during oral argument.[1]

At page 34 of its Brief, Northwest seems to criticize Capitol Airways for filing its Petition for Rehearing before the Board "ten months after oral argument." The fact of the matter is that oral argument was held January 28, 1958, and the Board did not render its decision until October 2, 1958—approximately eight months later. Capitol Airway's Petition for Rehearing was filed October 22, 1958, in strict accordance with the rules of practice of the CAB.

C. Position of Delta Airlines, Inc.

Delta Airlines, Inc, gratuitously submitted a Brief in Opposition to the Petition for a Writ of Certiorari, even though Delta is neither a party to this case nor has it even moved to be named a party respondent. Accordingly, Delta's Brief should be returned for failure to conform to the Court's Rules.

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[1] See 14 C.F.R. Section 302.52(b); which provides that all "written data" presented at oral argument "shall be limited to facts in the record of the case being argued" and shall be served upon the opposing parties at least five days in advance of the argument.

CONCLUSION

For the reasons recited, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 15, 1960

PROOF OF SERVICE

I, Coates Lear, attorney for Capitol Airways, Inc., Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on April 15, 1960, I served a copy of the foregoing Reply upon the persons listed below, by mailing copies, in duly addressed envelopes, with first-class postage prepaid, as follows:

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